



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 193 OF 2012**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**- VERSUS-**

**BUSINESS LIASON CO. LTD. .... 1ST DEFENDANT**

**COMMISSIONER OF LANDS..... 2ND DEFENDANT**

**RULING**

[1] The applicants application is dated 22nd October, 2012. The same prays for:

a) *The plaintiff herein, "Ethics & Anti-Corruption Commission," has no "locus standi" and or Constitutional mandate and any other legal (lawful) authority to institute, maintain, and prosecute the present suit against the 1st defendant herein.*

b) *Accordingly, the suit filed herein by the Plaintiff against the 1st defendant should be struck out, or alternatively, be dismissed.*

c) *Costs of this application as well as the entire suit against the 1st defendant be provided for by the plaintiff.*

The applicant based his application on Sec. 7 in part 111 of the Anti-Corruption & Economic Crimes Act No. 3 of 2003 relied on by the plaintiff which was repealed by Sec.37 of the Ethics and Anti-corruption Commission Act No. 22 of 2011. And that Sec.7 aforesaid as read with Sec. 11 (1) (k) of the Ethics and Anti-corruption Act No. 22 of 2011 were to be resorted to by the plaintiff, both sections offend the intention and purpose of article 7 of the Constitution. it is also argued that the defendant In this case is not a state officer in respect of which the plaintiff can exercise control for which it was set up as spelt in Article 79 of the Constitution. The applicant avers that the plaintiff herein is wholly incompetent in bringing of the present suit against the 1st defendant who is not a State Officer and that Article 156 (6)of the Constitution vests the right to defence of public rights on the Attorney General.

[2] The respondent, the Ethics and Anti-corruption Commission filed its grounds of opposition on 14th November, 2012. It argued that the plaintiffs application is merely frivolous vexatious and intended solely to defeat the ends of justice. It argued that the EACC and its predecessor KACA ACPU and KACC were all established pursuant to international legal obligations upon signature and ratification of the United Nations Convention against corruption. Whose scope under Article 3 extends to prevention

investigation and prosecution of corruption as well as freezing, seizure, confiscation and return of proceeds of corruption. That Article 6 and 65 of the constitution binds each state party to take legislative and administrative measures necessary for the implementation of the convention. It said that article 2 (6) of the Constitution acknowledge, those treaties and conventions. It argued that Article 79 established the plaintiff for the purposes of ensuring compliance with Chapter six and conferred upon the EACC the status and power of a Commission under Chapter fifteen of the Constitution of Kenya sets out under Article 252 thereof the general functions and powers of a Commission including under Article 252 (1) (d) the power to perform any function and exercise any powers presented by Legislation including the power conferred by the constitution. That Act (no 22 of 2011) was enacted in furtherance of Article 79 of the Constitution and this law sets out under Sec. 11 thereof all functions of EACC additional to those under Article 252 and those under Chapter 6 of the Constitution. The respondents argues that it has investigative powers under Article 252 (1) (a) and prosecutorial powers under section 11 (i) (k). That where the prosecution of corruption is concerned the role of EACC is clearly delineated from that of the DPP under Article 157 of the Constitution. That there is no delineation between EACC and the office of the Attorney General as defined by Article 156 of the Constitution and therefore no bar to institution of civil proceedings for recovery of public property. That the overlap of prosecutorial powers is itself not unconstitutional. That the applicant defendant does not dispute that irregular alienation of public land is corrupt conduct or that title to MN/1/5902 Is merely evidence of acquisition of proceeds of fraud or that the fraud in question constitutes corruption under Sec 2 of the Anti-corruption & Economic Crimes Act (No. 3 of 2003). That finally the applicants arguments are irreconcilable with judicial authority derived from Article 159 of the Constitution.

These are the competing issues in this case.

[3] I have had to determine the issues of locus standi of the Ethics and Anti-corruption Commission in the ***Mombasa ELC. NO. 218 of 2013*** where Boniface Katana Kilaveri the applicant in a similar application was represented by Mr. Paul Mbuti the Counsel for the applicant in this case on locus standi of the Ethics and Anti-corruption Commission I stated, that the respondent was established under Article 79 of the Constitution. That under Article 80 of the Constitution Parliament is allowed to enact legislation in Article 80 (a) for establishing procedures and mechanisms for effective administration of this chapter.

That under Article 252 (1) of the Constitution each Commission is an independent office holder and Article 252 (1) (d)

*"may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution".*

That the powers to prosecute are provided for by legislation to wit the Ethics and Anti-Corruption Act 22 of 2011 on Sec. 11 (k) as follows

*"institute and conduct proceedings in court for the purposes of recovery or protection of public property or for the freeze and confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures."*

I held that the commission has locus standi. I still hold the same in this case. The only other issue worth considering is the fact that the respondent filed suit under Sec.7 of the Anti-Corruption & Economic Crimes Act No. 3 of 2003 which had been repealed a year earlier by Section 37 of the Ethics and Anti-corruption Commission Act that came into operation on 5th September 2011.

[4] The applicant prayed for dismissal of this suit for that reason. Mainly that the suit was premised on non existent law. That the Commission has no mandate and or authority or any legal standing at all to institute a suit against the applicant on the basis of a repealed legislation.

I have considered, the able and well argued submissions by learned counsel for the applicant Mr. Paul Mbuti. I agree that the law relied on was repealed by Sec. 37 of the Ethics and Anti-Corruption

Commission Act that came into operation on 5th September 2011. But I note that this is a public spirited litigation. What is alleged to be recovered here is public land allegedly irregularly allocated. Should a court of law shut out a public spirited litigant like KACC on the ground that Counsel for the applicant relied on Sec 7 of the Anti corruption and Economic Crimes Act No. 3 of 2003 which had given him authority while he should have known it was repealed a year earlier? I am here mandated by the law to consider the interest of the applicant a limited liability company as against the interest of the public represented by the respondents the Ethics and Anti-corruption Commission. On the balance of proportionality herein I feel the respondent herein should be allowed time to consider amending their pleadings if they so wish and bring them in line with the law, so that the real issue as to whether or not the suit property was a public property and whether it was regularly or irregularly allocated to the applicant can be determined on merits. I was not told that the applicant was to suffer any known prejudice. I am convinced that any inconvenience to be suffered by the applicant should in the end be compensated by costs. I further order that the respondent to do the necessary amendment(s) of his pleadings within thirty (30) days of this ruling failing which this suit will be dismissed for invoking the wrong section of the law. The applicant shall have the cost of this application.

It is so ordered.

**Dated and delivered in open Court at Mombasa this 27th day of June, 2014.**

**S. MUKUNYA**

**JUDGE**

**27.6.2014**

In the presence of:

Chebkaka Advocate for Kagucia Advocate.